ALLIANZ GENERAL INSURANCE MALAYSIA BHD

v.

NAVIS SHIM LEE HIONG

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[CIVIL APPEAL NO: 12-52-2002-I]
31 OCTOBER 2003

CIVIL PROCEDURE: *Summary judgment - Motor insurance - Claim for loss of vehicle - Quantum payable - Whether based on market value of vehicle - Whether on sum insured - Whether a triable issue*

INSURANCE: *Motor insurance - Loss of vehicle - Claims - Quantum payable - Whether based on market value of vehicle - Whether on sum insured - RM120,000 specified in policy as "sum insured (market value)" - Whether connoting valued policy - Whether connoting market value of vehicle - Whether to be read with other conditions of policy*

The plaintiff had taken a motor vehicle insurance policy with the defendant and upon loss of the vehicle to theft claimed RM120,000 from the defendant, being the sum stated in the cover note as the "sum insured (market value)". The defendant did not deny liability, but maintained that it was liable to pay only RM93,000, being the market value of the vehicle at the relevant time. It was the defendant's stand that the policy was an unvalued policy and that the sum of RM120,000 stated on the cover note was only the estimated value of the said vehicle and not its market value. The learned Sessions Court judge, nonetheless, ruled that the defendant was contractually liable to pay the full insured sum and hence allowed summary judgment of the claim. The defendant appealed and the main issue that arose was whether, on the facts and in the circumstances herein, the disputed issue of the market value of the vehicle at the time of loss constituted a triable issue between the parties.

Held (allowing the appeal and granting leave to defend):

[1] This was not a suitable case for the grant of summary judgment. The issue of the market value of the said vehicle at the time of loss was very much a triable issue. (p 31 a)

[2] The fact that an amount was specified as the sum insured with the words "market value" in brackets in the relevant cover note and policy did not, without more, establish that the said policy is a valued policy. The cover

note ought to be read together with the defendant's usual form of policy. It was clear, from such reading, that nowhere in the said policy that the defendant had agreed with the plaintiff that in the event of loss, she would be paid the amount specified in the policy as the sum insured. What was agreed to was that, the maximum amount that the defendant would be liable to pay the plaintiff for any such loss, as seen in cl. 2(b) of the policy, is "the market value of your vehicle at the time of the loss or the sum insured in the policy whichever is the lower figure". In the circumstances, it was reasonable to conclude that the policy was an unvalued policy and that the sum of RM120,000 stated in the cover note and policy was the maximum sum recoverable in accordance with the terms of the policy but only if it was less than the market value of the said vehicle at the time of loss. (p 29 a-b)

[3] There was no basis for applying the *contra proferentum* rule as suggested by the plaintiff. The difficulty in valuation arose as a result of the non-availability of the said vehicle and not because of any ambiguity in the terms and conditions of the policy. The policy has set out how market value is to be assessed and it is up to the assessing court to decide what the market value is. (p 30 d-e)

Case(s) referred to:
Chop Eng Thye Co v. Malaysia National Insurance Sdn Bhd [1977] 1 MLJ 161 ***(foll)***
Supreme QBE Insurance Berhad v. Foo Yin Toh [1987] 2 CLJ 466; [1987] CLJ (Rep) 993 ***(refd)***

Other source(s) referred to:
Ivamy, *General Principles of Insurance Law*, 3rd edn, p. 231
Raoul Colinvaux, *The Law of Insurance*, 4th edn, p. 10

For the appellant - Frank Tang; M/s Tang & Partners
For the respondent - Chew Pok Oi; M/s Chew Jugah Wan Ullok & Co

Reported by WA Sharif

JUDGMENT

Clement Skinner J:
This is an appeal from the decision of the learned Sessions Court judge given on 27 November 2002 allowing the plaintiff's application for summary judgment against the defendant in the sum of RM118,800 with interest thereon at the rate of 8% per annum from 14 September 2001 until full payment. The plaintiff's claim is on a policy of insurance against loss, damage or liability

issued to the plaintiff by the defendant. The property insured was a motor-vehicle, a Volvo 850 bearing registration No. QKH 7362 (hereafter 'the said vehicle'). For convenience I shall, in this appeal, continue to refer to the appellant as the defendant and to the respondent as the plaintiff.

The facts giving rise to the plaintiff's claim are these.

On or about 16 November 2000 the defendant issued a Motor Insurance Policy No. 00VSM002937 ('the said policy') to insure the said vehicle against loss, damage or liability including theft for the period 17 September 2000 to 16 September 2001. In fact the said vehicle was first insured with the defendant in 1997 when it issued a policy No. 97KU005227 to the plaintiff for the period 15 May 1997 to 14 May 1998 ('the first policy'). The first policy was subsequently extended twice by the defendant until 16 September on the basis of proposals by the plaintiff for the same. So the said policy was in fact the third renewal of the first policy.

As the said policy was soon to expire, the plaintiff took steps to extend it for a fourth period. This led to the defendant issuing a Cover Note No. SMC0012893 on 13 September 2001 September 2001 to 16 May 2002.

However on 14 September 2001 ie, three days before the said policy was to expire, the plaintiff discovered the theft of the said vehicle. So the loss occurred while the said policy was still in effect.

When the plaintiff first proposed to insure the said vehicle with the defendant, the sum for which it was to be insured was stated in the proposal form as follows: "Sum Insured (market value) RM120,000". In each of the cover notes which were issued prior to the renewal of the policy on the next four occasions, the schedule states "Sum Insured (market value) RM120,000". The cover notes also contained an express provision that "the risk is Held Covered in the terms of the company's usual form of policy applicable thereto ..." . The said policy itself contains a schedule in which the sum insured is again stated as "sum insured (market value) RM120,000".

The relevant terms and conditions of the said policy with which this appeal is concerned are found in section A thereof and they set out the basis on which the defendant will settle any claims arising under the policy. On the happening of a loss covered by the said policy (of which theft is one), cl. 2 of section A states:

2. Basis of Settlement

(a) We will at our option

(i) pay the cost of repairs to your vehicle, or

(ii) pay in cash the amount of the loss or damage to your vehicle, or

(iii) reinstate or replace your vehicle.

(b) The maximum amount we will pay is the market value of your vehicle at the time of the loss or the sum insured in the Policy whichever is the lower figure.

(c) If your vehicle shall at the time of happening of any loss or damage (be it partial / total) be insured for a sum less than its market value then, you shall be considered as being your own insurer for the difference and shall bear the rateable proportion of the loss accordingly. Provided always that this shall not apply unless the market value at the time of the loss exceeds the insured value by 10%.

(d) The market value of your vehicle would be determined in the event of a dispute by the Head Office of the Franchise-holder and this value would be equal to the cost of purchasing a replacement vehicle of the same make, model and age of your vehicle at the time of loss.

(e) In the event no Franchise-holder is available for the make of your vehicle the market value of the vehicle would be determined by a Loss Adjuster Licensed under the Insurance Act, 1963 and its subsequent legislation agreed to by both you and us.

(f) The valuation done by the relevant Head Office of the Franchise-holder or Loss Adjuster Licensed under the Insurance Act 1963 and its subsequent legislation will be conclusive evidence in respect of the market value of the insured vehicle in any legal proceedings against the insured.

After the theft of the said vehicle the plaintiff entered into correspondence with the defendant, requesting to be paid the sum of RM120,000 as the amount stated in the said policy as the sum insured but the defendant offered a lesser sum, initially offering RM88,800 and then increasing the offer to RM93,000. After rejecting both offers the plaintiff commenced this action and then applied for summary judgment before a defence could be filed by the defendant. The learned Sessions Court judge allowed the plaintiff's application for summary judgment in the sum of RM118,800 after deducting RM1,200 for excess under the policy. Hence this appeal.

In the Sessions Court and now before me as well, the defendant did not deny or dispute liability under the policy. What the defendant does and did dispute is the amount payable to the plaintiff under the said policy. It is the defendant's contention that the said policy is an unvalued policy and that the sum of RM120,000 which was stated in the relevant cover note and said policy as the "sum insured (market value)" is only the estimated value of the said vehicle and not its market value. According to the defendant, even though an amount is specified in the policy as the sum insured, on a true construction of the terms of the said policy, the plaintiff is only entitled to be paid the market value of the said vehicle at the time of loss.

The defendant further contended that what the market value of the said vehicle was at the time of its loss is a question of fact which is seriously in dispute and which has given rise to a triable issue because whilst the defendant has produced evidence regarding what that value was, no evidence has been led by the plaintiff in support of her claim. According to the defendant, the only evidence regarding the market value of the said vehicle at the material time came from two documents produced by it, namely, (a) a report by Mclaren Saksama (Malaysia) Sdn Bhd, a licensed adjuster, who stated the adjusted loss for theft at the material time in respect of the said vehicle was RM94,000, and (b) a letter from Federal Auto Cars Sdn Bhd, the Franchise-holder of Volvo cars who assessed the market value of a vehicle of the same make, model and age as the said vehicle at around the time of loss to be in the range of RM90,000. The defendant says that if that evidence of market value was rejected by the learned Sessions Court judge as it must have been, as is evident from her entering summary judgment against the defendant for RM118,000, then there was no evidence upon which the learned Sessions Court judge could come to a decision that the market value of the said vehicle was RM120,000. It is the defendant's case that the plaintiff could only have succeeded in obtaining summary judgment by proving that the market value of the said vehicle was equal to the sum insured at the time of loss, which she failed to do and so this was not a case in which summary judgment could have been entered.

The plaintiff contends, on the other hand, that once the defendant had accepted the plaintiff's proposal to insure the said vehicle for RM120,000 and in having stated in the cover note and policy that the "sum insured (market value)" was RM120,000, she became entitled, contractually, to be paid the full insured sum of RM120,000 (less RM1,200 for excess) which the defendant had accepted as the value of the said car.

The plaintiff further contended that as the defendant had stated in the cover note which it issued on 13 September 2001 (in respect of the fourth renewal

of the policy) that the "sum insured (market value)" was RM120,000 and the said vehicle was stolen the next day, that was the conclusive value of the said vehicle at the time of loss.

The plaintiff also took the point that having been stolen, the said vehicle was not physically available for valuation purposes and therefore it would be futile to attempt to estimate the market value of the said vehicle in accordance with cl. 2(d) and (e) of section A of the said policy. For this reason also it was said that the evidence of market value that was offered in the two documents or reports that were produced by the defendant should be rejected, and the plaintiff entitled to have any ambiguity that may have arisen between the cover note and said policy resolved in favour of the plaintiff by applying the *contra proferentem* rule. In support of this proposition the plaintiff relied on the case of *Supreme QBE Insurance Berhad v. Foo Yin Toh* [1987] CLJ (Rep) 993.

In my judgment this appeal will turn on whether the said policy was a valued or an unvalued policy. Before considering this question, it is appropriate that I say something about the law on the matter at hand.

In Ivamy's *General Principles of Insurance Law*, 3rd edn at p. 231 it is stated that:

> All policies of insurance, whatever the kind of insurance to which they relate, may be classified in two ways:
>
> 1. According to the manner in which the subject matter is described.
>
> 2. According to the amount recoverable in the event of loss.

We are here concerned with the second category of insurance policies described by Ivamy and as far as this classification is concerned, Ivamy goes on to state and I quote:

> 2. According to the amount recoverable
>
> Two types of policy fall within this class:
>
> (a) 'Unvalued' policies.
> (b) 'Valued' policies.
>
> **(a) 'Unvalued' policies.**
>
> In the case of an 'unvalued' policy the sum to be paid to the assured is not fixed by the policy, but left to be ascertained after the loss has happened, e.g. in the case of policies of insurance against liability and most policies of insurance on property.

The sum specified in the policy as the amount of insurance, if any, merely indicates the amount beyond which the liability of insurers does not extend .... .

(b) 'Valued' policies.

In the case of a 'valued' policy the amount recoverable is fixed by the policy, e.g. personal accident policies and certain policies of insurance on property.

All personal accident policies belong to this class, and, as the value of life or limb cannot be accurately measured, the sum fixed in the policy is not open to objection on the ground of overvaluation.

In the case of an insurance on property, the value of the subject-matter may be fixed by agreement and inserted in the policy as the amount recoverable in the event of loss.

This valuation is binding, except in the case of fraud or mistake, and dispenses the assured from the necessity of proving the value of his interest, though he must still prove that he has an interest in the subject-matter of insurance.

With the above definition of a valued and unvalued policy in mind, I now turn to consider what type the said policy was. Although the plaintiff has not gone so far as to say that the said policy is a valued policy, to me the stand that she has taken amounts to saying the same thing because when she submitted that she became entitled, contractually, to be paid the full insured sum of RM120,000 (less RM1,200 excess) which the defendant had accepted as the value of the said vehicle (which was proposed by her) and specified that amount in the cover note and policy as the "Sum Insured (market value)", what she is saying is that the value of the said vehicle had been fixed by agreement and inserted in the said policy as the amount recoverable in the event of loss.

In my judgment whether the said policy was a valued or unvalued policy is essentially a question of construction of the relevant terms found in the said policy which is best undertaken in the context of the following question: By specifying in the said policy that RM120,000 was the "sum insured (market value)", had the value of the said vehicle become fixed by agreement and inserted in the said policy as the amount recoverable in the event of loss? If so, then the said policy is a valued policy and the plaintiff will be entitled to be paid that sum on proof of the loss.

For the reasons that follow I do not think that it was.

In my view the fact that an amount has been specified as the sum insured with the words "market value" in brackets in the relevant cover note and said policy does not, without more, establish that the said policy is a valued policy because the cover note incorporates the terms and conditions of the defendant's usual form of policy and so both documents must be read together. When that is done it will be seen that nowhere in the said policy did the defendant agree with the plaintiff that in the event of loss, she would be paid the amount which had been specified in the policy as the sum insured. Instead, what the defendant had agreed to was that the maximum amount it would be liable to pay the plaintiff for any such loss "is the market value of your vehicle at the time of the loss or the sum insured in the policy whichever is the lower figure". (cl. 2 [b]). The other provisions of cl. 2 then go on to set out how market value is to be assessed or arrived at. So a reading of the said policy as a whole will show that the sum to be paid to the plaintiff is not fixed by the policy but left to be ascertained after the loss has happened. It is reasonable to conclude that the said policy was an unvalued policy and that the sum of RM120,000 stated in the cover note and policy was the maximum sum recoverable in accordance with the terms of the said policy but only if it was less than the market value of the said vehicle at the time of loss. In arriving at my above conclusion I have adopted the approach taken by Ajaib Singh J in *Chop Eng Thye Co v. Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 161 at p. 164.

What I have stated above also accords with what the learned author in *The Law of Insurance* by Raoul Colinvaux, 4th edn had to say about the term "sum insured" found in a policy of insurance. This is what the learned author said at p. 10:

> Sum insured. The agreement by the insurers to indemnify the assured is rarely an unqualified one; nearly always their liability is limited to a named amount known as the "sum insured". Where the value of the thing lost exceeds this sum, this sum is all that they are bound to pay; where the value of the thing lost is less, they are bound, except in the case of a valued policy, to pay no more than its actual value. There the principle of indemnity comes into operation to limit their liability to the loss actually suffered by the assured, for their undertaking is to pay that loss only.

It is for the above reasons that I agree with the submission of counsel for the defendant that the fact that RM120,000 was specified in the policy as the sum insured together with the words "market value" appearing within brackets did not mean that the defendant had agreed that that was the market value of the said vehicle because the defendant was perfectly entitled to accept the plaintiff's

valuation of the said vehicle for the purpose of fixing the sum insured and the rate of premium payable and yet remain liable for the actual loss only by including terms and conditions in the policy to that effect.

With regard to the plaintiff's contention that because the said vehicle was stolen one day after the defendant had issued the cover note of 13 September 2001 in which the "sum insured (market value)" was stated as being RM120,000 and so that estimate must be taken as conclusive value of the said vehicle at the time of loss, I regret I do not agree with this contention for the simple reason that the cover note incorporates the terms and conditions of the defendant's usual form of policy and I have already expressed my views on what these terms say.

With regard to the plaintiff's arguments based on the *contra proferentem* rule, I regret that I do not agree with them because whilst it might be said that the absence of the said vehicle will make it more difficult to assess its market value at the date of its loss, this does not mean that an ambiguity has arisen in the said policy. The difficulty in valuation has arisen as a result of the non-availability of the said vehicle and not because of any ambiguity in the terms and conditions found in the said policy. Notwithstanding the absence of the said vehicle, the said policy does set out how market value is to be assessed and so it will be up to the assessing court to decide, after evaluating the evidence on market value that is presented to it by the parties, what that value is.

With reference to the case of *Supreme QBE Insurance Berhad v. Foo Yin Toh (supra)* which is relied on heavily by the plaintiff, I do not think that case is of any assistance to the plaintiff here because it is clear to me that in that case Mustapha Hussain J applied the *contra proferentem* rule against the insurance company there for good reason. The learned judge did so because the policy of insurance in that case specified that the payment of indemnity will be based on the "market value" of the vehicle at the time of loss, but there was no indication in the policy of how the "market value" was to be assessed, and so the learned judge, applying the *contra proferentem* rule, held that the insured there was entitled to be paid the amount specified in the policy as the sum insured. But as I have already pointed out, in our case there are express provisions in the said policy dealing with how the market value is to be assessed and so in my view the *contra proferentem* rule has no application to the facts of our case.

For all the reasons given above this was not a suitable case for the grant of summary judgment. The issue of the market value of the said vehicle at the time of loss was very much a triable issue. I accordingly allow this appeal with costs, set aside the judgment entered against the defendant and give leave to the defendant to defend the action on the issue of market value of the said vehicle at the time of its loss.